

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2007-440-E - ORDER NO. 2008-588
AUGUST 26, 2008

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| IN RE: | Application of Duke Energy Carolinas, LLC |) | ORDER DENYING |
| | for Approval of Decision to Incur Nuclear |) | MOTION TO RESCIND |
| | Generation Preconstruction Costs for the Lee |) | OR AMEND |
| | Nuclear Station in Cherokee County |) | COMMISSION ORDER |
| | |) | NO. 2008-417 |

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (“Commission”) on the motion of Friends of the Earth (“FOE”) to rescind or amend Order No. 2008-417, dated June 9, 2008, which approved the Application of Duke Energy Carolinas, LLC (“Duke” or the Company”) to incur nuclear generation preconstruction costs. Because of the reasons stated below, we deny the motion.

II. FOE MOTION

The grounds for FOE’s motion are based on its allegation that material new evidence, unavailable to the Commission or to the Intervenor prior to the time for seeking rehearing or reconsideration, undermines the basis for the determination that incurring such nuclear plant costs is reasonable or prudent in light of the information available to Duke at the time, and considering the other alternatives available to the utility for supplying its generation needs. According to FOE, a fundamental premise of the Duke Application and of the Commission’s decision was the assertion that the chosen

Westinghouse AP1000 reactor design embodied a standardized design which was subject to an accelerated US Nuclear Regulatory Commission (NRC) licensing process. Such approved standard design was to lead to a “much higher level of predictability of project cost and schedule,” according to Duke witness Jamil. Tr., Vol. 4 at 381-382. FOE asserts that while Mr. Jamil did acknowledge that such a cost and schedule assumption “has not yet been demonstrated,” neither Duke nor the Commission recognized on the evidentiary record the extent of actual design and schedule uncertainty associated with the chosen Westinghouse AP1000 reactor.

According to FOE, the fuller extent of the AP1000 design and schedule uncertainty, with an associated reduced level of project cost and schedule predictability has only been recently revealed. According to FOE, a June 27, 2008 letter states that due to Westinghouse’s June 3, 2008, withdrawal of significant AP1000 “design basis information” necessary for NRC design approvals, without submission of replacement supporting information, “there remains uncertainty about the schedule” for AP1000 design approval previously outlined by the NRC. As stated by FOE, the NRC now hopes to meet a goal of informing Westinghouse of a revised design review schedule by August 30, 2008. FOE alleges that insufficient information was provided to the NRC on various important technical issues related to the AP1000, and that lack of information had caused “uncertainty about the schedule” to persist. Thus, FOE alleges that there exists no schedule to finalize the AP1000 design; therefore scheduling of the project is interrupted and costs to Duke and rate payers are impacted.

According to FOE, it was incumbent upon Duke to fully explain that the certification by the NRC in December 2005 did not certify a final design. FOE alleges that it is only via the June 27 letter from the NRC that it was able to see uncertainty regarding the design of the AP1000. Under FOE's theory, the prudence and reasonableness of the Westinghouse AP1000 design, as well as the information known to Duke regarding the above-stated uncertainty must now be reassessed. FOE also states that the delay can affect the costs of the long-lead procurement items, which were counted among Duke's preconstruction costs.

FOE asserts delays encountered since the design was "certified" in 2005 and the alleged current design delay indicate that yet more design delays will be encountered as the NRC's AP1000 review process continues. Accordingly, FOE requests that Order No. 2008-417 be rescinded, or in the alternative, that the preconstruction case be reopened for further proceedings.

III. DUKE MEMORANDUM IN OPPOSITION

Duke filed a memorandum in opposition to the FOE motion. Duke asserts two grounds for its position. First, Duke alleges that the FOE motion is actually a request for reconsideration or rehearing of Order No. 2008-417, and such a request is not permitted under South Carolina law at this time. Second, Duke states that the arguments advanced by FOE in support of the motion provide no basis for the relief it seeks, as virtually identical issues were previously considered by this Commission in issuing Order No. 2008-417 approving Duke's decision to incur preconstruction costs for the Lee Nuclear Station.

With regard to the first ground, Duke points out that although FOE has cited S.C. Code Ann. Section 58-27-2130 as authority for its motion, the applicable provision is actually S.C. Code Ann. Section 58-27-2150, which governs petitions for rehearing of matters determined by the Commission. The latter section requires that a petition for rehearing be filed within ten days of service of the order. Order No. 2008-417 was received by FOE on June 10, but its motion was filed July 24, which is after the ten day deadline had passed.

We agree with Duke that the relationship between the two sections is plainly stated in Section 58-27-2130: “[t]he Commission may at any time, except in those cases provided for in Section 58-27-2150, after notice and after opportunity to be heard as provided in the case of petitions, rescind or amend any order or decision made by it.” (emphasis added). Therefore, under this language, an issue which could be raised in a petition for rehearing may not be raised under Section 58-27-2130.

The basis of the FOE motion is purported new evidence, found in a June 27 letter, which FOE argues established uncertainty as to the NRC’s design certification for the AP1000 technology selected for the proposed Lee Nuclear Station. Duke argues that although FOE has attempted to present the basis for its motion as a change in circumstances relating to the NRC process for approval of the Westinghouse AP1000 reactor design, this is not really the argument being advanced. Duke asserts that what has happened at the NRC is simply part of the process described by Duke in support of its application. This process was described at the hearing on this matter by Dhiaa Jamil, the Company’s Chief Nuclear Officer. Jamal’s testimony, according to Duke, made it plain

that the NRC process had been changed and was now intended to “provide for completion of safety reviews before substantial construction is authorized.” Tr. Vol. 4 at 381. Jamil went on to point out that “[t]he combination of these changes should logically lead to a much higher level of predictability of project cost and schedule; however, this assumption has not been tested.” *Id.* (emphasis added). Duke asserts that Order No. 2008-417 cited this testimony as part of the basis for its finding that “...in light of the significant benefits flowing from the maintenance of the nuclear option, as well as the significant hurdles remaining for the development of that option, the assurances provided by granting the Company’s Application is necessary to allow the Company to move forward with continued development of nuclear generation capability.” Order No. 2008-417, pp. 18-19. (emphasis added).

Duke states that the June 27, 2008 NRC letter to Westinghouse regarding the revision is simply an example of the process described by Duke witness Jamil and recognized by the Commission in allowing the Company to move forward to confront these significant hurdles. Duke further asserts that what FOE is really arguing in its motion is that the Commission should not have approved the application until there was more certainty in the NRC licensing process, which is an argument that FOE made in opposing the application and could have attempted to make again in a petition for rehearing pursuant to Section 58-27-2150. Since that argument is one that FOE should have made by a petition for rehearing, FOE, under Duke’s theory, is precluded from raising the issue under Section 58-27-2130. Accordingly, Duke states that the FOE motion to amend or rescind is untimely, not authorized by statute, and should be denied.

Duke also contends that the June 27, 2008 NRC letter provides no basis for amending or rescinding Order No. 2008-417. As Order No. 2008-417 reflects, the purpose of Duke's application was to obtain the Commission's approval of its decision to incur preconstruction costs in connection with the proposed Lee Nuclear Station. Duke states that, as authorized by S.C. Code Ann. Section 58-33-225, this proceeding focused on whether it was reasonable for the Company to take steps in preparation for potential construction of that facility in light of the information known at that time. The provision specifically contemplates a review of a proposed or planned facility at an early time in the planning process prior to commencement of construction. Duke explained in its application the process that it would follow to keep the "nuclear option open," but also made it clear that no final decision had been made by the Company to construct the Lee Nuclear Station. Tr. Vol. 4 at 325. Further, Duke asserted that "the regulatory approval process for the Lee Nuclear Station is lengthy and complex," and the Company had just taken the "first steps" in that process. *Id.* Accordingly, Duke points out that the uncertainties and challenges regarding the technical and NRC regulatory approval process for the Lee Nuclear Station that the FOE asserts as the basis for its motion were both expressly acknowledged by Duke in the proceeding before the Commission (Tr. Vol.4 at 381), and also forms the basis of the Company's application to determine the prudence of its decision to incur preconstruction costs. Duke asserts that this Commission considered this evidence, the FOE testimony, and the record as a whole in issuing Order No. 2008-417 on June 9, 2008.

In addition, Duke notes that although FOE characterizes its arguments as “new” arguments to question the NRC design certification for the AP1000 technology, the design was fully certified by the NRC and entered into NRC regulations via a Federal Register notice published on January 27, 2006 (71 FR 4464). Consequently, NRC applicants intending to construct and operate an AP1000 design could do so by referencing the AP1000 design certification rule in Title 10 of the Code of Federal Regulations at Part 52, Appendix D, “Design Certification Rule for the AP1000 Design.” Additionally, according to Duke, the NRC issued a revised Final Design Approval based on Revision 15 of the Westinghouse Design Control Document on March 10, 2006. As such, Duke asserts that a company can use the currently approved AP1000 design to actually construct and operate a new reactor, even though the NRC design certification process allows for approval of design enhancements through revisions to an already certified design. Westinghouse is now utilizing this aspect of the NRC design certification process to further enhance the AP1000 design by filing Revision 16 of the design control document with the NRC on May 26, 2007. Duke states that the fact that Revision 16 is pending before the NRC does not change the fact that the AP1000 has already been fully certified by the NRC as evidenced in 10 CFR Part 52.

Because of this reasoning, Duke concludes that the June 27, 2008 NRC letter cited by FOE is simply part of the NRC review process for an enhancement to the design certification of the Westinghouse AP1000 reactor design. Approval of revisions to certified designs is therefore, according to Duke, just one part of the lengthy and complex approval process which must be completed as part of the proposed Lee Nuclear Station.

The fact that additional information is requested by the NRC from Westinghouse in the certification process and that a deadline may be changing in that process is, according to Duke, no basis for amending or rescinding this Commission's approval of the decision by the Company to incur costs to keep the nuclear option open.

Duke notes that the NRC reached a similar conclusion in rejecting a nearly identical argument to the one made by FOE here regarding Revision 16 in connection with the Progress Energy COLA for its proposed new reactors at the Shearon Harris Nuclear Power Plant in North Carolina. An intervenor in that proceeding, the North Carolina Waste Awareness and Reduction Network ("NCWARN"), asked the NRC to suspend the proceeding on the Progress COL until completion of Revision 16 of the certified design for the AP1000. The NRC rejected NCWARN's request and refused to delay the COL proceeding on that basis, according to Duke, noting that its rules specifically contemplated that parties could proceed with licensing proceedings prior to completion of the design certification review process. See NRC Memorandum and Order in Dockets 52-022 COL and 52-023 COL, dated July 23, 2008. Duke reasons that if the NRC sees no reason to delay a COL proceeding which seeks approval to actually construct a new nuclear facility to await final certification of a revision to the AP1000 design, there is certainly no reason for this Commission to reconsider its decision to approve Duke's decision to incur preconstruction costs to continue the development of the proposed Lee Nuclear Station and preserve the option of this resource for its customers. Duke concludes by stating that the FOE motion presents no basis for the relief it seeks, and it should be denied.

IV. CONCLUSION OF THE COMMISSION

After considering both the FOE motion and the Duke Memorandum in Opposition, we agree with and adopt the reasoning of the Duke Memorandum in Opposition. The FOE motion must be denied.

First, we agree that under the circumstances, S.C. Code Ann. Section 58-27-2150 governing petitions for rehearing applies under the present circumstances, rather than S.C. Code Ann. Section 58-27-2130. The FOE motion should have been filed within ten days of its receipt of Order No. 2008-417 under Section 58-27-2150. Since it was not, the motion was not timely filed under the statute.

Clearly, the concern raised by FOE should have been raised in a motion or petition for rehearing, since FOE's concern was not actually new matter, despite the fact that FOE allegedly based its motion on a June 27, 2008 letter. Although that letter was used to argue the uncertainty of NRC's design certification for the AP1000 technology selected for the proposed Lee Nuclear Station, the circumstances described in that letter were simply part of the process described by Duke in testimony in support of its application. Duke witness Dhiaa Jamil clearly referenced at the hearing on the application that the NRC process had been changed and was now intended to "provide for completion of safety reviews before substantial construction is authorized." Tr. Vol. 4 at 381. Although Jamil stated that the changes should logically lead to a much higher level of predictability of project cost and schedule, he also stated that the assumption had not been tested. Order 2008-417 cited this testimony as part of its conclusion that significant hurdles remained for the development of the nuclear option, and that the Company

needed the assurances provided by the Order to move forward with continued development of nuclear generation capability. Order No. 2008-417 at 18-19. Duke stated in its memorandum, and we agree, that the June 27, 2008 NRC letter to Westinghouse regarding the revision is simply an example of the process described by Duke witness Jamil at the hearing in this case, and recognized by the Commission in allowing the Company to move forward to confront these significant hurdles. Duke further asserts, and we agree that what FOE is really arguing in its motion is that the Commission should not have approved the application until there was more certainty in the NRC licensing process. FOE made this argument in opposing the application, and FOE could have made the argument again in a petition for rehearing under S.C. Code Ann. Section 58-27-2150. Since Section 58-27-2130 precludes raising matters that should have been raised under Section 58-27-2150, the FOE motion is not authorized by statute, and could be denied on this ground alone. Since we hold that the motion should have been filed under Section 58-27-2150, we also agree that the FOE motion was untimely, having been filed after the ten day period required by that statute.

We also concur with Duke's second argument that the June 27, 2008 NRC letter provides no basis for amending or rescinding Order No. 2008-417. This proceeding focused on whether it was reasonable for the Company to take steps in preparation for potential construction of the Lee Nuclear Station, in light of the information known at that time. The Base Load Review Act at Section 58-33-225 specifically contemplates a review of a proposed or planned facility at an early time in the planning process prior to commencement of construction. Duke explained in its application the process that it

would follow to keep the “nuclear option open,” but also made it clear that no final decision had been made by the Company to construct the Lee Nuclear Station. Tr. Vol. 4 at 325. Also, Duke explained that it had just taken the first steps in a lengthy and complex regulatory approve process for that Station. Therefore, we agree with Duke’s assertion that the uncertainties and challenges regarding the technical and NRC regulatory approval process for the Lee Nuclear Station that FOE asserts as the basis for its motion were both expressly acknowledged by Duke in the proceeding before the Commission, and that they formed the basis of the Company’s application to determine the prudence of its decision to incur preconstruction costs. Indeed, this Commission considered this evidence, the FOE testimony, and the record as a whole before issuing Order No. 2008-417 on June 9, 2008. When all was said and done, we concluded that, despite the uncertainties clearly described by Duke, and by FOE, that it was prudent for Duke to proceed with preconstruction on the Lee Nuclear Station.

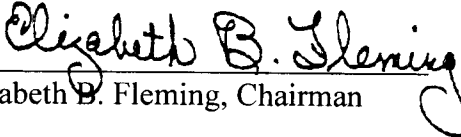
We also agree with Duke’s assertions that the design for AP1000 technology was fully certified by the NRC. This certification was made available to the public in the Code of Federal Regulations. Consequently, NRC applicants intending to construct and operate an AP1000 design could do so by referencing the AP1000 design certification rule in that Code. The process does allow for approval of design enhancements through revisions to an already certified design. Such a revision is the subject of the June 27 letter cited by FOE. Again, we agree that this is just part of the lengthy and complex review process seen at the NRC, and does not constitute grounds to amend or rescind this Commission’s approval of the decision by the Company to keep the nuclear option open.

The FOE motion is also denied based on this reasoning.


Accordingly, the FOE motion, even if it had been filed in a timely manner, does not present any reason for this Commission to amend or rescind Order No. 2008-417. The FOE Motion is denied.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:


Elizabeth B. Fleming, Chairman

ATTEST:


John E. Howard, Vice Chairman

(SEAL)